

December 1, 1999

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In the Matter of: \*  
\*  
David E. Barber \*  
Claimant \*  
\*  
v. \*  
\* Case No. 1999-LHC-1322  
Electric Boat Corporation \*  
Employer/Self-Insurer \*  
\* OWCP No. 1-139371  
and \*  
\*  
Director, Office of Workers' \*  
Compensation Programs, United \*  
States Department of Labor \*  
Party-in-Interest \*  
\*\*\*\*\*

Appearances:

David N. Neusner, Esq.  
For the Claimant

Lawrence M. McLoughlin, Esq.  
For the Employer/Self-Insurer

Merle D. Hyman, Esq.  
Senior Trial Attorney  
For the Director

Before: **DAVID W. DI NARDI**  
Administrative Law Judge

**DECISION AND ORDER - AWARDING BENEFITS**

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 27, 1999 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

**Post-hearing evidence has been admitted as:**

<b>Exhibit No.</b>	<b>Item</b>	<b>Filing Date</b>
CX 10	Attorney Neusner's letter filing his	09/09/99
CX 11	Fee Petition	09/09/99
RX 19	Employer's comments thereon	09/13/99

The record was closed on September 13, 1999 as no further documents were filed.

**Stipulations and Issues**

**The parties stipulate, and I find:**

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the relevant times.
3. On December 6, 1996, Claimant suffered an injury in the course and scope of his employment.
4. Claimant gave the Employer notice of the injury in a timely manner.
5. Claimant filed a timely claim for compensation on or about December 11, 1996 and the Employer filed a timely notice of controversion on December 30, 1996.
6. The parties attended an informal conference on October 8, 1997.
7. The applicable average weekly wage is \$667.10.
8. The Employer voluntarily and without an award has paid temporary partial compensation from December 10, 1996 through the present, for a total of \$54,963.80. Medical benefits thus far total \$2,186.79.

**The unresolved issues in this proceeding are:**

1. The nature and extent of Claimant's disability.
2. The date of his maximum medical improvement.
3. The applicability of Section 8(f) of the Act.

**Summary of the Evidence**

David E. Barber ("Claimant" herein), fifty-seven (57) years of age, with an eighth grade education and an employment history of manual labor, began working on December 3, 1961 at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. He worked as a chipper/grinder for two years and he used various air-powered, vibratory tools to perform his assigned duties. He left the shipyard in 1963 and went to work for the Town of Westerly, Rhode Island in various jobs for seven years. He then went to work as a truck driver for several firms for approximately seven years and he returned to the shipyard on January 6, 1976 again as a chipper/grinder. He worked all over the boats as directed and he again used on a daily basis air-powered, vibrating tools, such as "whirly-birds," chipping hammers, "murphy's," etc., Claimant remarking that this was physically-demanding work and involved much overhead work while standing on work stagings. He had to climb up/down several levels of ladders, while carrying his tool bag, machines, hoses, etc., to reach his work site. (CX 9 at 3-6)

On March 31, 1988 Claimant injured his back in a shipyard accident while working on the 755 Boat. (RX 5) He was out of work for various periods of time and the Employer paid appropriate compensation totalling \$35,476.90. (RX 6) The Employer authorized appropriate medical care and treatment. (RX 8) The injury resulted in the imposition of work restrictions by Dr. Philo F. Willetts, Jr., an orthopedic surgeon, on October 26, 1989 (RX 9) and the Employer provided suitable adjusted work. As of May 1, 1990 Dr. Willetts imposed restrictions against climbing ladders but stair climbing was permitted. (RX 9-8) The Employer has also paid Claimant for his fifteen (15%) loss of use of the back, as of November 13, 1990, an award permitted by the state act. (RX 11; CX 9 at 7, CX 2)

Claimant's back continued to bother him after his return to work and he also began to develop tingling and numbness in both hands and he started to lose his grip strength. Once he was using a heavy grinding machine and he dropped it because of his lack of grip strength and the falling grinder almost cut his foot. He then decided to report those problems to the Employer and he was referred to Dr. S. Pearce Browning, III, an orthopedic and hand surgeon, and the doctor began to treat Claimant's lumbar and bilateral hand problems. Dr. Browning, who first saw Claimant on January 15, 1990 (CX 2) at the Employer's request, saw Claimant on December 16, 1996 and the doctor diagnosed Claimant's problems as due to bilateral hand/arm vibration syndrome and the doctor advised Claimant that he could not return to work as a chipper/grinder and that he should talk to the Employer about a medical retirement. (CX 2)

Claimant stopped working on December 6, 1996, about one or two days after he dropped the machine; he then went to see Dr. Browning on December 10, 1996. He was also experiencing back problems at this time. (CX 9 at 8-11; TR 19-21, 27-31)

Claimant has been treated for hypertension since 1987 and he takes medication therefor. He smoked two packs per day of cigarettes for about thirty-two years and he quit in 1994 on his own because of sinus congestion. The Employer gave Claimant, as one of the "disabled" workers, a bus pass allowing Claimant to ride the bus up the steep shipyard hill, commonly referred to by some workers as heartbreak hill or cardiac hill. He obtained that pass in 1988. He returned to work after the shipyard strike in the Summer of 1988 and the Employer provided light duty work as a bench grinder and he remained in that restricted work until December 6, 1996, at which time he no longer could work because of his lumbar and HAVS, Claimant remarking, "My hands got so bad, it was either that or I was going to either hurt somebody bad (SIC) or hurt myself." (CX 9 at 12-15)

Claimant worked as a security guard while working for the Employer and, after he left the shipyard, he has worked sixteen (16) hours per week on the weekends, work which is primarily sedentary and for which he is now paid \$5.50 per hour, earning \$88.00 per week. He is able to do that job because he essentially sits at a desk, answers the phone and makes his rounds at certain intervals. (CX 9 at 15-20; TR 32-34)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

#### **Findings of Fact and Conclusions of Law**

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his

employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, *supra*, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, *i.e.*, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, *supra*. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, *supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of

causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his hand/arm vibration syndrome (HAVS), resulted from working conditions at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

## **Injury**

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-

work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's daily use of air-powered vibratory tools resulted in a condition diagnosed as HAVS on December 10, 1996, that the Employer had timely notice of such injury, authorized appropriate medical care and treatment and has paid appropriate temporary partial benefits effective December 7, 1996 (RX 3), and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

#### **Nature and Extent of Disability**

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job

opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

### **Sections 8(a) and (b) and Total Disability**

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "Pepco"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director**, OWCP, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a chipper/grinder. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding**



and Dry Dock Company, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). See also **Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore,

there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on February 18, 1997 and that he has been permanently and partially disabled from February 19, 1997, according to the well-reasoned opinion of Dr. Browning. (RX 4)

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Turner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **decision and order on reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook, supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). The proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson, supra; Cook, supra**.

The parties herein have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White, supra** at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his bilateral HAVS and that his current employer has allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see, e.g., Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th

Cir. 1984), **rev'g and rem. on other grounds *Turner v. Trans-State Dredging***, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many times and the First Circuit Court of Appeals in ***White*, supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. ***Swain v. Bath Iron Works Corporation***, 17 BRBS 145, 147 (1985); ***Darcell v. FMC Corporation, Marine and Rail Equipment Division***, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, ***New Orleans (Gulfwide) Stevedores, Inc. v. Turner***, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. ***Royce v. Elrich Construction Co.***, 17 BRBS 157 (1985).

In the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, and the parties are in agreement as to Claimant's post-injury wage-earning capacity.

As noted above, Claimant works as a security guard two days per week, sixteen hours, earning \$88.00 per week. It is obvious that Claimant wants to continue working and he is encouraged to do so.

Accordingly, Claimant, as of February 19, 1997, is entitled to an award of permanent partial disability based upon the difference between his average weekly wage of \$667.10 and his wage-earning capacity of \$88.00, pursuant to Sections 8(c)(21) and 8(b) of the Act.

### **Medical Expenses**

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. ***Perez v. Sea-Land Services, Inc.***, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. ***Colburn v. General Dynamics Corp.***, 21 BRBS 219, 22 (1988); ***Barbour v. Woodward & Lothrop, Inc.***, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. ***Addison v. Ryan-Walsh Stevedoring Company***, 22 BRBS 32, 36 (1989); ***Mayfield v. Atlantic & Gulf Stevedores***, 16 BRBS 228 (1984); ***Dean v. Marine Terminals Corp.***, 7 BRBS 234 (1977). Furthermore, an employee's

right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

## **Interest**

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

## **Section 14(e)**

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits, nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to Claimant, as stipulated by the parties. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

## **Section 8(f) of the Act**

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or

partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), *rev'd and remanded on other grounds sub nom. Director v. Berstresser*, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), *aff'd*, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, *supra*, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, *supra*.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron)**, *supra*.

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant worked for the Employer from 1961-1963 and from 1976 to December 6, 1996, (2) that Claimant has suffered from hypertension since 1987, (3) that he injured his back in a serious shipyard accident on March 31, 1988 (RX 5), (4) that the Employer paid appropriate compensation while he was unable to work (RX 6), (5) that that injury resulted in a fifteen (15%) loss of use of the back (RX 11), (6) that the Employer accepted and paid that disability rating (**Id.**), (7) that the Claimant returned to work with restrictions and the Employer provided suitable bench work for him, as well as a bus pass up the steep hill at the shipyard, in the Fall of 1988, (8) that the Employer retained Claimant as a valued employee until December 6, 1996, at which time Claimant had to stop working because of his chronic lumbar problems and his HAVS and (9) that Claimant's permanent partial disability is the result of the combination of his pre-existing permanent partial disability and his December 6, 1996 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Browning (RX 4) and Dr. Willetts. (RX 9) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on December 6, 1996, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee



would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

#### **Attorney's Fee**

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney filed a fee application on September 9, 1999 (CX 11), concerning services rendered and costs incurred in representing Claimant between October 21, 1997 and August 30, 1999. Attorney David N. Neusner seeks a fee of \$5,147.52 (including expenses) based on 15.25 hours of attorney time at \$195.83 and \$200.00 per hour and 33.25 hours of paralegal time at \$59.08, \$60.50, \$61.20, \$61.90 and \$64.00.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained and the hourly rates charged and certain itemized services. (RX 19)

In accordance with established practice, I will consider only those services rendered and costs incurred after October 8, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

The Employer objected to the hourly rate and proposed hourly rates of \$185.00 for Attorney Neusner and \$55.00 for the paralegals of his firm. The hourly rate suggested by the Employer is certainly not realistic at this time, especially in contingent litigation where the attorney's fee is dependent upon successful prosecution. Such a fee if adopted in these claims, would quickly diminish the quality of legal representation. This matter has been successfully prosecuted with a most reasonable number of hours and the fee petition as submitted is hereby approved. The matter was conferenced on October 8, 1997, has been in disputed status since

that time and the challenged services are typical of those performed in a law firm. Accordingly, I reject the Employer's objections. Moreover, I shall approve the requested hourly rate in view of the length of time the matter has been pending.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of \$5,147.52 (including expenses of \$70.49) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

#### **ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. Commencing on February 19, 1997, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent partial disability, based upon the difference between his average weekly wage at the time of the injury, \$667.10, and his wage-earning capacity after the injury, \$88.00, as provided by Sections 8(c)(21) and 8(h) of the Act.

2. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his December 6, 1996 injury. The Employer shall also receive a refund, with appropriate interest, of any overpayments of compensation made to Claimant herein.

4. Interest shall be paid by the Employer and Special Fund on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the first Order provision above, subject to the provisions of Section 7 of the Act.



6. The Employer shall pay to Claimant's attorney, David N. Neusner, the sum of \$5,147.52 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between October 21, 1997 and August 30, 1999.

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**DAVID W. DI NARDI**  
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln